

89-1559

SUPREME COURT, U.S.

FILED

APR 3 1990

JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STEVE ESTES,
Petitioner,

versus

CITY OF MOORE, OKLAHOMA; MOORE PUBLIC
WORKS AUTHORITY; ROBERT SWANAGON,
individually and as City Manager of the
City of Moore, Oklahoma and Manager of
the Moore Public Works Authority; ODELL
MORGAN, individually and as Chairman of
the Personnel Board of the City of Moore,
and CHARLES THOMPSON, individually and
as member of the Personnel Board of the
City of Moore, Oklahoma,

Respondents.

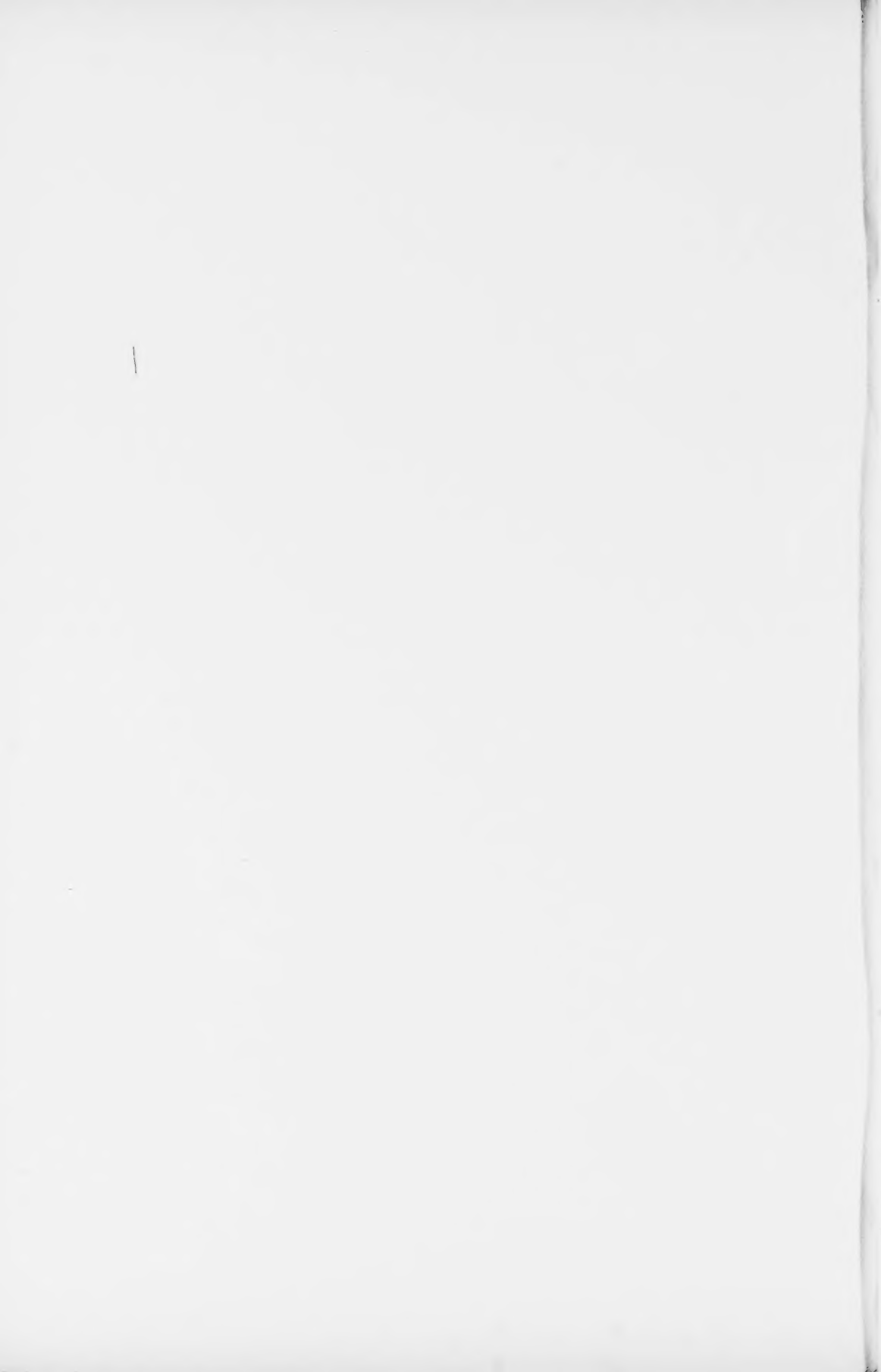
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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March 1990



IN THE SUPREME COURT OF THE UNITED STATES

STEVE ESTES, Petitioner,

versus

CITY OF MOORE, OKLAHOMA; MOORE PUBLIC WORKS AUTHORITY; ROBERT SWANAGON, individually and as City Manager of the City of Moore, Oklahoma and Manager of the Moore Public Works Authority; ODELL MORGAN, individually and as Chairman of the Personnel Board of the City of Moore, and CHARLES THOMPSON, individually and as member of the Personnel Board of the City of Moore, Oklahoma, Respondents.

**QUESTIONS
PRESENTED FOR REVIEW**

1. Where the people of a charter city have adopted Merit System protection for city employees, should a city manager be allowed unlimited discretion in dismissal of employees contrary to the will of the people and the terms of the city charter?

2. Where a city charter provides power to the city council to adopt rules, regulations and ordinances to protect employees and to promote a Merit Protection

system, is the exercise of such power by the council valid limitation on a city manager's discretion?

3. Where a city council enacts ordinances and personnel rules providing for tenure of public employees and protection from dismissal absent cause, are employees vested with a property interest in continued employment?

4. Where a city charter provides for post-termination hearing, and where a city council personnel rule provides for pre-termination hearing, and an employee is discharged and denied opportunity for either hearing, has he been provided due process of law?

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REPORTS OF OPINIONS OF LOWER COURTS

The opinions of the United States District Court for the Western District of Oklahoma and of the United States Court of Appeals for the Tenth Circuit are unpublished opinions and are copied in the Appendix hereto.

STATEMENT OF JURISDICTION

Judgment of the Court of Appeals was rendered and entered November 22, 1989, and Petitioner sought rehearing, which was denied by order filed January 5, 1990.

This petition for writ of certiorari is brought pursuant to the provisions of Title 28, United States Code, Section 1254.

PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

Relevant to this petition are the portions of the constitution, statutes, ordinances and regulations cited below.

The text of these laws are set out in the Appendix hereto.

United States Constitution:

Fourteenth Amendment to the
Constitution of the United States

United States Statutes:

42 U.S.C. Section 1983

Oklahoma Statutes:

12 O. S. Section 951

Moore City Charter:

Sections 2-4, 8-1, 8-3, 8-4

Moore Ordinances:

Sections 2-126, 2-127, 2-153, 2-154,
2-155, 2-158, 2-161

Moore Personnel Rules and Regulations:

Sections entitled "Intent and Application", "Dismissal", and "Pre-determination procedures".

STATEMENT OF THE CASE

Petitioner was hired by the City of Moore in 1976, as Deputy Municipal Court Clerk, in 1980 was promoted to City Prosecutor, and in 1981 was further promoted to Assistant City Attorney. He continued to serve as such for 7 years until, on May 8, 1987, he received a letter by certified mail from the city manager, Robert W. Swanagon, purporting to fire him from his employment of over eleven years.

Petitioner requested a post-discharge hearing as provided by city charter and ordinance. On June 11, 1987, the Personnel Board of the respondent City of Moore met, and respondents Thompson and Morgan, constituting a majority of the Personnel Board, voted to not afford a hearing to the petitioner.

Personnel policy of the City of Moore is regulated by city charter, or-

dinances and personnel regulations which provide, inter alia, for pre-termination hearings and post-termination hearings, as well as specific reasons why an employee may be discharged.

Petitioner was not afforded any hearing before or after his discharge, and the purported reason for his discharge is not within any of the specific reasons for discharge of a city employee, as adopted by the City Council pursuant to City Charter.

Suit was brought in the United States District Court for the Western District of Oklahoma pursuant to Title 28, United States Code, Sections 1331, the Fourteenth Amendment to the Constitution of the United States, and Title 42, United States Code Section 1983, also seeking relief on pendant state claims.

The district court granted summary

judgment in favor of respondents by order entered February 21, 1990. Appeal was taken to the United States Court of Appeals for The Tenth Circuit, which affirmed the district court on November 22, 1989. Petitioner filed a petition for rehearing which was denied by order dated January 5, 1990.

Copies of the various judgments and orders of the lower courts appear in the Appendix hereto.

ARGUMENT

PROPOSITION I: PETITIONER HAD A REASONABLE EXPECTATION OF CONTINUING PUBLIC EMPLOYMENT UNDER LOCAL LAW AND WAS ENTITLED TO DUE PROCESS OF LAW BEFORE AND AFTER HIS DISMISSAL.

The action below was brought by petitioner under the provisions of 42 U.S.C. Section 1983, which protects individuals from state action which may deprive individuals of life, liberty or property. This case involves a property

interest in continued public employment and whether petitioner was entitled to due process notice and hearing before being deprived of his job and salary.

Petitioner must establish the existence of a property interest in continued employment by reliance on local or state law, Board of Regents v. Roth, 408 U.S. 564 (1972), Bishop v. Wood, 426 U.S. 341.

In this case, the respondent city is a charter city and as such is fundamentally governed by the provisions of the charter which create it. Charter provisions relating to matters of personnel policy provide in part as follows:

"The council, consistently with this charter, by ordinance or personnel rules, may regulate personnel matters and provide for proper personnel administration." (Moore City Charter Sec. 8-1)

This provision is consistent with

Charter Section 2-4, which provides that "...all powers of the city, including the determination of all matters of policy, shall be vested in the council..."

Charter section 8-3 divides employees into the classified and unclassified services. Charter section 8-4 provides that a discharged employee in the classified service after a six month probationary period is entitled to appeal his discharge to the personnel board. Section 8-4 further provides for a public hearing on the appeal, and provides that "if the board finds that the ...removal...was made for a political reason or reasons or for any other reason or reasons than the good of the service, it shall veto the ...removal, and the action by the City Manager...shall be nullified thereby." The complete text of Moore Charter Sections 2-4, 8-1, 8-3 and 8-4 appear in the

Appendix.

Charter provision 8-1 quoted above specifically authorizes the City Council to adopt ordinances and personnel rules. This the City Council has done, and relevant to this case is the "Personnel Ordinance," Moore City Code Section 2-126 et seq., which provides:

"Sec. 2-127. Policy declared.
It is hereby the declared personnel policy of the city that:

(1) Employment in the city government shall be based on merit and fitness, free of personal and political considerations.

(2) Just and equitable incentives and conditions of employment shall be established and maintained to promote efficiency and economy in the operation of the city government.

**

(4) Appointments, promotions and other actions requiring the application of the merit principle shall be based on tests and evaluation; and shall not be based on longevity or any

other method in conflict with city charter requirements relating to the merit and fitness principle.

(5) High morale shall be maintained by fair administration of this division and by every consideration of the rights and interests of employees consistent with the best interests of the public and the city.

(6) Tenure of employees covered by this division shall be subject to good behavior, the satisfactory performance of work, necessity for the performance of work and the availability of funds."

Sections 2-153, 2-154 and 2-155 of the personnel ordinance provide for a probationary period of six months to twelve months for new employees, after which an employee acquires "permanent status."

Section 2-158 of the personnel ordinance provides that "(T)he tenure of every employee shall be conditioned on good behavior and the satisfactory performance of duties....," and Section 2-161 further

states that:

"(A) permanent employee may be dismissed or demoted whenever in the judgement of the appointing authority the employee's work or misconduct so warrants."

The balance of Section 2-161 requires written notice to the employee and an explanation of his appeal rights as afforded by the City Charter. In addition to the Personnel Ordinance, the Moore City Council has adopted Personnel Rules and Regulations, containing sections entitled "Dismissal" and "Predetermination Procedures," the text of which is attached hereto. Such rules provide for dismissal for "misconduct;" fourteen specific areas of misconduct are listed for which dismissal is authorized by the council's rules. A section of the personnel rules entitled "Intent and Application" appearing in the Appendix clearly states the intent of the council

that all employees were afforded the rights contained therein.

Petitioner believes these local enactments, by the people of Moore and by their elected council members, constitute a firm commitment to the protection of public employees from arbitrary and malicious discharge from employment. The Charter permits the council to regulate the discharge of employees, and the council has repeatedly asserted that the only permissible bases for the discharge of an employee are unsatisfactory work performance or misconduct.

In this case, City Manager Swanagon did not allege either poor work performance or misconduct by petitioner: Swanagon simply summarily fired petitioner and hired his own personal attorney at a substantially greater salary than that paid petitioner.

Both the Court of Appeals for the Tenth Circuit and the Oklahoma Supreme Court have previously found the law of Oklahoma to provide that a public employee may have a "sufficient expectancy of continued employment to constitute a property interest, which must be afforded constitutionally guaranteed due process," Vinyard v. King, 728 F.2d. 428, at 432 (10th Cir. 1984), citing Hall v. O'Keefe, 617 P.2d. 196, (Okla. 1980), wherein the Supreme Court of Oklahoma said at page 200,

"More recently the law has recognized that the terms of employment established by an employer or by contract may create a sufficient expectancy of continued employment to constitute a property interest which must be afforded constitutionally guaranteed due process."

In Vinyard, the plaintiff was fired without a hearing. The District Court rendered summary judgment for defendant

on plaintiff's Section 1983 claim, finding plaintiff had no property interest in continued employment. The Tenth Circuit reversed, finding that an employee handbook provided that permanent employees could only be discharged for cause. The Court examined the provisions of the employee handbook and described the relevant provisions in footnote 8 to its opinion as follows:

8. The handbook defines discharge as "the immediate termination of an employee's services for any of the following specific causes. Record, Vol. 2, at 243, 244. Despite the fact that the list is nonexclusive, it is clear that an employee may only be discharged for cause."

In Estes' case, the Personnel Rules adopted by the Council constitute terms of his employment and also provide specific reasons for dismissal, which is squarely in line with the Vinyard holding.

This Honorable Court held in Cleveland Board of Education v. Loudermill, 470 U. S. 532 (1985) that where state law provided "classified civil service employees" were entitled to retain their employment "during good behavior and efficient service" and who could not be dismissed "except ... for ... misfeasance, malfeasance or nonfeasance in office," such employees possessed property rights in continued employment, Loudermill, supra, at 539, 540. Webster's Seventh New Collegiate Dictionary defines misfeasance as "the performance of a lawful action in an illegal or improper manner," malfeasance as "wrongful conduct esp. by a public official" and nonfeasance as "omission to do what esp. ought to be done."

The standard for discharge contained in the ordinances and personnel rules of

the City of Moore are substantially identical to those dealt with in Loudermill; in Moore city government, "tenure of every employee shall be conditioned on good behavior and the satisfactory performance of duty," Moore Ordinance 2-158. Moore Ordinance 2-161 provides "a permanent employee may be dismissed ... whenever ...the employee's work or misconduct so warrants." The personnel rules and regulations give specific examples of misconduct sufficient to justify dismissal.

The Court held in Loudermill that where the property interest in continued public employment exists, the Due Process Clause of the Fourteenth Amendment requires that before a deprivation of such employment occurs, such deprivation "be preceded by notice and opportunity for hearing appropriate to the nature of

the case," (citation omitted), and "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest," (emphasis in original, citations omitted), Loudermill, at 542.

The duty of the City of Moore to conduct such a pretermination hearing as mandated in Loudermill is recognized in its own personnel procedures for the termination of employees. The section of the personnel rules and regulations entitled "Pre-determination (sic) procedures" found in the Appendix requires written notice to the affected employee, appointment of a panel to hear the matter, opportunity to be represented by counsel, presentation of witnesses and documentary evidence, etcetera.

Where a public employee may not be discharged without cause and the deter-

mination of cause is not a matter solely within the discretion of the employer, but is subject to administrative and judicial review, a constitutionally protected property interest exists, Poolaw v. City of Anadarko, 660 F.2d 459 (10th Cir. 1981).

In Poolaw the city charter specifically provided that plaintiff could not be discharged except for cause, and provided for appeal by a review board and the state judicial system, and the court found "[T]hese procedures are clearly sufficient to give Poolaw a legitimate expectation that his employment will continue absent cause for discharge," Poolaw, at 463.

In Estes' case, the decision of the city manager to fire plaintiff was subject to review by the personnel board by provisions of Section 8-4 of the City

Charter, and the decision of the personnel board, had it held a hearing and made a decision, was subject to review by the Oklahoma courts by provision of Title 12, Oklahoma Statutes Section 951 which provides:

"A judgment rendered, or final order made, by any tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court except where an appeal to some other court is provided by law."

Case law under Section 951 holds that city council service commissions deciding personnel matters exercise judicial functions and are properly appealed to the district courts of Oklahoma, see Civil Service Comm. of City of Tulsa v. Gresham, 653 P.2d 920 (Okla.1982), and In re White, 355 P.2d 404 (Okla. 1960).

The basic issue the district court

and appellate court did not address is the relative powers of the city council and city manager in personnel matters. The charter gives power to regulate personnel matters and policy to the council, but provides the city manager with power to appoint and remove. It must be assumed that each of the enactments of the city founders were intended to have meaning and effect and that these provisions must be construed to mean that the city manager's discretion is controlled and bounded by the city council's determinations regarding policy. The policy contained in the personnel ordinances and personnel rules were adopted under specific authority of Section 8-1 of the City Charter, and constitute valid exercise of the city council's power to regulate personnel matters, and impose a limit upon the city manager's discretion.

These charter-authorized enactments, designed to protect public employees from arbitrary and discriminatory decisions of the city manager, are valid and needed restrictions on what the district court referred to as "the city manager('s) wide range of discretion on personnel matters."

The entire personnel classification plan provided for in Section 8-3 of the Charter, the authority vested in the Council to adopt ordinances and personnel rules and the enactment of such rules providing tenure, permanent employee status after probation, dismissal for cause after a pre-termination hearing, and post-termination appeal, all constitute a legislative and regulatory plan for employee protection against wrongful, arbitrary discharge, evidencing an intent of the policymakers of the

employer (the city council) that employees of the city retain their employment during good behavior and satisfactory job performance and protecting against removal except for cause. These protections are "terms of employment" that the employees of the City are entitled to rely upon and which vest them with a legitimate expectation that they will continue in employment.

CONCLUSION

Petitioner, after eleven years of faithful service, terminated without cause, denied pre-termination hearing, denied post-termination hearing, denied right to trial before the lower courts, has been deprived of his salary for almost three years, and still seeks an opportunity to be heard. He respectfully prays the Court reverse the decision of lower courts and grant him an opportunity

to be heard and to try the issues presented by his complaint to a jury.

Respectfully submitted,

William Amis Pipkin
William Amis Pipkin

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd
day of April, 1990, I served true correct
copies of the foregoing "Petition for
Writ of Certiorari" upon:

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William Amis Pipkin
William Amis Pipkin

APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

STEVE ESTES,)
)
Plaintiff-Appellant,)
)
vs.) NO. 89-6102
) (D.C.No.CIV-
CITY OF MOORE, OKLAHOMA;) 88-737-A)
MOORE PUBLIC WORKS) (W.D. Okla.)
AUTHORITY; ROBERT)
SWANAGON, individually)
and as City Manager of)
the City of Moore, Okla-)
homa and Manager of the)
Moore Public Works)
Authority; ODELL MORGAN,)
individually and as)
Chairman of the Personnel)
Board of the City of)
Moore, and CHARLES THOMP-)
SON, individually and as)
member of the Personnel)
Board of the City of)
Moore, Oklahoma,)
)
Defendants-Appellees.)

ORDER AND JUDGMENT*

Before **McKay, Seymour, and Tacha,**
Circuit Judges.

After examining the briefs and
appellate record, this panel has de-

terminated unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

This appeal is from an order of the district court granting summary judgment in favor of defendant City of Moore and various individual city officials in an action brought pursuant to 42 U.S.C. 1983 and including pendent state claims. The plaintiff appeals on the grounds that the district court erred in granting summary judgment in favor of defendants and alleges that the defendants deprived him of a constitutionally protected

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

property interest in his job as assistant city attorney without due process of law. We affirm.

The plaintiff was employed on a part-time basis as the assistant city attorney of defendant City. The city manager, by letter, terminated plaintiff's employment without a hearing. Plaintiff alleges that either the City Charter or the personnel rules and regulations of the City created in him a "sufficient expectancy of continued employment to constitute a property interest, which must be afforded constitutionally guaranteed due process." Vinyard v. King, 728 F.2d 428, 432 (10th Cir. 1984), quoting Hall v. O'Keefe, 617 P.2d 196, 200 (Okla. 1980). We disagree. An examination of the City Charter and applicable rules and regulations convinces us that this case is controlled by

our determination in Graham v. City of Oklahoma City, 859 F.2d 142 (10th Cir. 1988). We see no principled way to distinguish this case from Graham. We therefore AFFIRM for substantially the reasons given by the district court. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

(Above Order and Judgment filed Nov. 22, 1989)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEVE ESTES,)	
)	
Plaintiff-Appellant,)	
)	
vs.)	NO. 89-6102
)	
CITY OF MOORE, OKLAHOMA;)	
MOORE PUBLIC WORKS)	
AUTHORITY; ROBERT)	
SWANAGON, individually)	
and as City Manager of)	
the City of Moore, Okla-)	
homa and Manager of the)	
Moore Public Works)	

Authority; ODELL MORGAN,)
individually and as)
Chairman of the Personnel)
Board of the City of)
Moore, and CHARLES THOMP-)
SON, individually and as)
member of the Personnel)
Board of the City of)
Moore, Oklahoma,)
)
Defendants-)
Appellees.)

ORDER

Filed January 5, 1990

Before HOLLOWAY, Chief Judge, McKAY,
LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA,
BALDOCK, BRORBY, EBEL, Circuit Judges.

This matter comes on for consid-
eration of appellant's petition for re-
hearing with suggestion for rehearing en
banc.

Upon consideration whereof, the
petition for rehearing is denied by the
panel that rendered the decision.

In accordance with Rule 35(b),
Federal Rules of Appellate Procedure, the
petition for rehearing and suggestion for

rehearing en banc were transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

(Above Order was entered Jan. 5, 1990)

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

STEVE ESTES,)	
)	
Plaintiff,)	
)	
vs.)	NO.
)	CIV-88-737-A
CITY OF MOORE, OKLAHOMA;)	
MOORE PUBLIC WORKS)	
AUTHORITY; ROBERT)	
SWANAGON, individually)	
and as City Manager of)	

the City of Moore, Okla-)
homa and Manager of the)
Moore Public Works)
Authority; ODELL MORGAN,)
individually and as)
Chairman of the Personnel)
Board of the City of)
Moore, and CHARLES THOMP-)
SON, individually and as)
member of the Personnel)
Board of the City of)
Moore, Oklahoma,)
)
Defendants.)

ORDER

The defendants move the Court for summary judgment pursuant to Fed. R. Civ. P. 56. The Court has considered the parties' briefs and evidentiary submissions. For the reasons noted below, the defendants' Motion for Summary Judgment is granted.

I.

The plaintiff Estes is an attorney licensed to practice law in the State of Oklahoma. In April 1988, he instituted this lawsuit against the City of Moore, Oklahoma, the Moore Public Works

Authority, and several city officials, including City Manager Robert W. Swanagon, under 42 U.S.C. Section 1983. The plaintiff alleges that the defendants deprived him of his constitutionally protected property interest in his job as assistant city attorney without due process of law.¹ By letter dated 7 May 1987, City Manager Swanagon fired the plaintiff, noting his intention to reorganize the city attorney's office to

¹The plaintiff also invokes the pendant jurisdiction of the Court to recover for injuries allegedly inflicted upon him by the City of Moore, and the named city officials. See Okla. Stat. Ann. tit. 76, Section 6 (West 1976) (providing a person with "the right of protection . . . from personal insult, from defamation, and from injury to his personal relations"). In view of the Court's disposition of the plaintiff's section 1983 claims, the pendant state claims are dismissed without prejudice in the interests of judicial economy and fairness to the litigants. See Carnegie-Mellon University v. Cohill, 108 S.Ct. 614, 619, n.17 (1988); United Mineworkers v. Gibbs, 383 U.S. 715, 726 (1966).

provide for one full-time city attorney.² Basically, the plaintiff alleges that the city manager's termination decision was arbitrary and violated the due process clause because the plaintiff was not afforded a pre-termination hearing.

II.

The facts presented to the Court upon a motion for summary judgment must be construed in a light most favorable to the nonmoving party. Board of Education v. Pico, 457 U.S. 853, 863 (1982). If there can be but one reasonable conclusion as to the material facts, summary judgment is appropriate. The Court is precluded from granting summary judgment

²The parties' submissions may raise a dispute as to whether the plaintiff was, in fact, a full-time employee of the City of Moore. See Code of the City of Moore Section 2-73; Complaint Paragraph 7; Affidavit of Steve Estes Paragraph 3. However, under the Court's analysis, this dispute would not be as to a material fact.

where there is genuine dispute as to a fact which is material, that is, a fact which is relevant under the applicable substantive law. Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 248-52 (1986). "Only disputes over facts which might affect the outcome of the suit under the governing law will properly preclude the entitlement to judgment as a matter of law." Id. at 248. Moreover, entry of judgment is mandated against a party, after adequate time for discovery and upon motion, who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

As noted, the plaintiff Estes' section 1983 action rests on an alleged

violation of the due process clause of the fourteenth amendment. To sustain his action, the plaintiff must establish the existence of an interest protected by that clause -- specifically, a property interest in continued employment as assistant city attorney. See, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985); 3 J. Cook & J. Sobieski, Civil Rights Actions Paragraph 12.02[C] (1988). Moreover, the asserted property interest cannot be the product of speculation or wishful thinking. "To have a property interest in a benefit, a person clearly must have more than a abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). In discerning the existence of a

protected property interest, courts make reference to state law. See, e.g., Bishop v. Wood, 426 U.S. 341, 345-47 (1976); 2 R. Rotunda, J. Nowak & J. Young, Treatise on Constitutional Law: Substance and Procedure Section 17.5 (d) (1986).

III.

Based upon its examination of pertinent local law, the Court concludes that the plaintiff Estes did not have a property interest in his job as assistant city attorney. As relevant here, Section 8-1 of the Charter of the City of Moore provides that "removals, demotions, suspensions, and layoffs shall be made solely for the good of the service." Construing Oklahoma law, both state and federal courts have held that the underscored language does not confer a property interest on employees. See Graham v.

City of Oklahoma City, 859 F.2d 142, 146 (10th Cir. 1988); Meder v. City of Oklahoma City, 672 F. Supp. 500, 501-02 (W.D. Okla. 1987); Hall v. O'Keefe, 617 P.2d 196, 198-200 (Okla. 1980).

In Graham, for example, a discharged police officer brought an action under section 1983 against the City of Oklahoma City and several city officials, alleging that he was deprived of a property interest in his job without due process of law. The Charter of Oklahoma City states that "removals and demotions shall be made solely for the good of the service." Citing Hall, supra, the Tenth Circuit held that, under Oklahoma law, the Charter's language is "not sufficient to create a legitimate expectation of entitlement to continued employment absent cause for discharge." 859 F.2d at 146. The Court finds Graham, and the other

cited decisions, to be on all fours with the case at bar. Consequently, the plaintiff Estes' section 1983 action must fail.³

³In large part, the parties focus their arguments on the following issue: Whether the plaintiff Estes' status as a licensed attorney, without more, bars his assertion of a protected property interest in his job. On this point, the defendant cites the Oklahoma Supreme Court's decision in White v. American Law Book Co., 233 P. 426 (Okla. 1924). In White, the court observed that:

The relationship of attorney and client is one of reliance, trust and confidence. When any element of this relationship is destroyed, for whatever reason, the client has the absolute right, in the interest of his own welfare, to discharge the attorney.

233 P. at 427. As to its personal nature, the defendant contends that the relationship between a municipal attorney and his or her client city is not significantly different than the attorney-client relationship found in private settings. See Osman v. Hialeah Housing Authority, 785 F. 2d 1550, 1551 (11th Cir. 1986); City of Tulsa v. Oklahoma State Pen. & Ret. Bd., 674 P.2d 10, 12 (Okla. 1983). If properly

To support his property interest contention, the plaintiff Estes relies primarily on two expressions of local policy: (1) the Charter provisions of the City of Moore that provide for a classified service; and (2) the city's employment guidelines that specify grounds for discharge. Section 8-3 of the Charter designates certain city positions, including mayor, council-member, and city manager, that fall into the "unclassified service" and provides that "[a]ll other officers and employees shall be in the classified

(Footnote 3 cont'd) circumscribed, the defendant's argument is not without merit. Cf. Jordan v. City of Lake Oswego, 734 F.2d 1374, 1375-76 (1984) (upholding the trial court's finding that a discharged full-time city attorney did have a property interest in his job, when he was appointed for a 4-year term). However, give the clear import of the Charter language on the property interest issue, the Court need not rule on the defendant's argument.

service." Charter section 8-4 grants those employees in the classified service the right to post-determination notice as to the reasons for adverse employment decisions and establishes an appeals procedure. Section 8-4 provides that:

If the board (conducting appeals) finds that the layoff, suspension, demotion or removal was made for political reason or reasons or for any other reason or reasons than the good of the service, it shall veto the layoff, suspension, demotion or removal and the action by the city manager or other authority shall be nullified thereby.

With little or no record support, the plaintiff asserts that he is a classified employee, entitled to the benefits of Charter sections 8-3 and 8-4. Affidavit of Steve Estes Paragraph 5. Even if the Court credits the plaintiff's assertion on this point, his property interest contention fails. Section 8-4 clearly cannot confer a property interest

on the plaintiff in continued employment, for it merely entitles an employee to post-determination notice and review of adverse personnel decisions. See Skeets v. Johnson, 816 F. 2d 1213, 1215-16 (8th Cir. 1987) (noting that the courts have "separately identified" property interests, not based them on the process available); see also Loudermill, 470 U.S. at 542-43 (noting the importance of pre-termination procedures for the protection of property interests). Moreover, with the exception of the qualifying language regarding political reasons for employment decisions, the review board's standard for evaluating the city manager's employment decisions as to the classified service is simply "for the good of the service." As noted, under Oklahoma law, such a standard cannot confer a property interest on the

plaintiff.

The plaintiff Estes' reliance on the personnel rules of the City of Moore is also misplaced. To be sure, viewed in isolation, a city's personnel rules or guidelines may create a sufficient expectation of continued employment to invoke the protections of the due process clause. See Vinyard v. King, 728 F.2d 428, 432 (10th Cir. 1984). However, in the instant case, the Charter of the City of Moore empowers the city manager to discharge employees "for the good of the service." As discussed above, this Charter language vests the city manager with a wide range of discretion in making personnel decisions. Such Charter-based discretion cannot be effectively circumscribed by personnel regulations and the like. As the Tenth Circuit noted in Graham: "Under Oklahoma law, where

certain terms of employee dismissals are explicitly stated in the city charter, the city manager or other city officials are not authorized to alter or otherwise restrict these terms so as to legally bind the city." 859 F.2d at 146; see Umholtz v, City of Tulsa, 565 P.2d 15, 22 (Okla. 1977); cf. Shlay v. Montgomery, 802 F.2d 918, 921-22 (7th Cir. 1986) (holding that a superior's oral promise of career employment could not give an assistant corporation counsel a property interest in his job when the promise was unauthorized under state law). Thus, the personnel rules and regulations of the City of Moore could not give the plaintiff Estes what the Charter expressly denied him, a property interest in continued employment.

IV.

In sum, the Court finds that, at the

time of his dismissal from his position as assistant city attorney, the plaintiff Estes did not possess a constitutionally protected property interest in his job. Accordingly, as to the plaintiff's claim under section 1983, the Court grants the defendants' Motion for Summary Judgment.

It is so ordered this 20th day of February, 1989.

WAYNE E. ALLEY
United States District Judge

Entered in judgment docket 2-21-89

**TEXT OF RELEVANT CONSTITUTIONAL
PROVISIONS, STATUTES, CHARTER, ORDINANCES
AND RULES AND REGULATIONS**

UNITED STATES CONSTITUTION:

Fourteenth Amendment to the United States Constitution.

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUTES:

Title 42 U.S.C. Section 1983

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

OKLAHOMA STATUTES:

**Title 12, Oklahoma Statutes, Section 951
Section 12-951. Appellate Jurisdiction of the District Court.**

A judgment rendered, or final order

made, by any tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court where an appeal to some other court is provided by law.

CITY OF MOORE CHARTER:

Section 2-4. Council:Powers.

Except as otherwise provided in this charter, all powers of the city, including the determination of all matters of policy, shall be vested in the council. Without limitation of the foregoing, the council shall have power, subject to the provisions of this charter:

(1) To appoint and remove the city manager;

(2) By ordinance to enact municipal legislation;

(3) To raise revenue and make

appropriations, and to regulate bond elections, the issuance of bonds, sinking funds, the refunding of indebtedness, salaries and wages, and all other fiscal affairs of the city.

(4) To inquire into the conduct of any office, department, or agency of the city government, and investigate municipal affairs;

(5) To appoint or elect and remove the members of the personnel board, the members of the planning commission, the members of the board of adjustment, and other quasi-legislative, quasi-judicial, or advisory officers and authorities, now or when and if established, or to prescribe the method of remission of fines and costs;

(6) To grant pardons for violations of the charter and ordinances, including the remission of fines and costs;

(7) To regulate elections, the initiative and referendum, and recall;

(8) To regulate the organization, powers, duties, and functions of the municipal court and of the minor violations bureau when and if established;

(9) To create, change, and abolish all offices, departments, and agencies of the city government other than the offices, departments, and agencies created by this charter; and to assign additional powers, duties, and functions to offices, departments, and agencies created by the charter.

**Section 8-1. Appointments, removals,
etc.--Personnel regulations.**

Appointments and promotions in the service of the city shall be made solely on the basis of merit and fitness; and removals, demotions, suspensions, and layoffs shall be made solely for the good

of the service. The council, consistently with this charter, by ordinance or personnel rules, may regulate personnel matters and provide for proper personnel administration.

Section 8-3. Classified and unclassified services.

All officers and employees of the city shall be divided into the classified and the unclassified service.

(1) The following shall constitute the unclassified service:

(a) The mayor and other councilmen, and the municipal judge;

(b) The city manager, and one secretary to the city manager, if any;

(c) Members and secretary of each board, commission, or other plural authority;

(d) All personnel who serve without compensation;

(e) Persons appointed or employed on a temporary basis to make or conduct a special audit, inquiry, investigation, study, examination, or installation, or to perform a temporary professional or technical service, subject to such exceptions, limitations, and regulations as the ordinances or personnel rules may prescribe; and such other temporary personnel as may be placed in the unclassified service by ordinance or personnel rules.

(2) All other officers and employees shall be in the classified service; provided that, when the city has over 30,000 people as shown by any last preceding federal census, any of the following may be placed in the unclassified service by ordinance or personnel rules: One assistant city manager if any; the heads, or directors, of administra-

tive departments; and one secretary for each such head, or director, who has a secretary.

(3) Nothing herein shall prohibit including personnel in the unclassified service in the classification plan.

**Section 8-4. Removal, etc.--Hearing
before the personnel board.**

The city manager or any other authority who lays off, suspends without pay for more than ten days, demotes, or removes any regular (that is, nontemporary) officer or employee in the classified service after a probationary period of six months, shall, at that time or within two days thereafter, deliver, or have delivered, or mail by registered, certified, or similar special mail, to the officer or employee a written statement of the reason or reasons for

the layoff, suspension, demotion, or removal. Such officer or employee may appeal in writing to the personnel board. The appeal must be filed with the secretary of the board, or with the city clerk for transmittal to the board, within ten (10) days after receipt of notice of the layoff, suspension, demotion, or removal (which appeal may thus be filed either before or after the time of effectiveness of the layoff, suspension, demotion, or removal). As soon as practicable thereafter, the board shall hold a public hearing on the appeal, or give an adequate opportunity therefor, and shall report in writing its findings and recommendations, in cases of subordinates of the city manager, to the city manager, and in other cases to the respective authorities having power of removal; and the city manager or other

authority having power of removal shall then make a final decision in writing regarding the appellant's layoff, suspension demotion, or removal, as the case may be; provided that, if the board finds that the layoff, suspension, demotion, or removal was made for a political reason or reasons or for any other reason or reasons than the good of the service, it shall veto the layoff, suspension, demotion, or removal, and the action by the city manager or other authority shall be nullified thereby.

CITY OF MOORE ORDINANCES

Sec. 2-126. Short Title.

This division shall be known as the "Personnel Ordinance."

Sec. 2-127. Policy declared.

It is hereby the declared personnel policy of the city that:

- (1) Employment in the city

government shall be based on merit and fitness, free of personal and political considerations.

(2) Just and equitable incentives and conditions of employment shall be established and maintained to promote efficiency and economy in the operation of the city government.

(3) Positions having similar duties and responsibilities shall be classified and compensated on a uniform basis.

(4) Appointments, promotions and other actions requiring the application of the merit principle shall be based on tests and evaluation; and shall not be based on longevity or any other method in conflict with city charter requirements relating to the merit and fitness principle.

(5) High morale shall be maintained by fair administration of this division

and by every consideration of the rights and interests of employees consistent with the best interests of the public and the city.

(6) Tenure of employees covered by this division shall be subject to good behavior, the satisfactory performance of work, necessity for the performance of work and the availability of funds.

Sec. 2-153. Probation.

Employees appointed from original appointment eligible lists or from promotional eligible lists shall be subject to a period of probation. The regular period of probation shall be six (6) months; provided that, the personnel rules may specify a longer or shorter period of probation for certain designated job classes, or for extension of the probation period in individual cases. No probationary period may

extend beyond twelve (12) months.

Sec. 2-154. Work and Conduct of Probationary Employees.

The work and conduct of probationary employees shall be subject to close scrutiny and evaluation, and if found to be below standards satisfactory to the appointing authority, the appointing authority may remove or demote the probationer at any time during the probationary period. Such removals or demotions shall not be subject to review or appeal.

Sec. 2-155. Permanent Status.

An employee shall be retained beyond the end of the probationary period and granted permanent status only if the appointing authority affirms that the service of the employee has been found to be satisfactory and recommends that the employee be given permanent status.

Sec. 2-158. Separations.

The tenure of every employee shall be conditioned on good behavior and the satisfactory performance of duties. Any employee may be temporarily separated by layoff or suspension; or permanently separated by resignation or dismissal.

Sec. 2-161. Dismissal or Demotion-- Notification, Etc.

A permanent employee may be dismissed or demoted whenever in the judgement of the appointing authority the employee's work or misconduct so warrants. When the appointing authority decides to take such action he shall file with the employee and the personnel board a written notification containing a statement of the substantial reasons for the action. The employee shall be notified not later than the effective date of the action. The notice shall

inform the employee that he shall be allowed ten (10) calendar days from receipt of the notice of the action to file a reply with the city clerk or the personnel board and to request a hearing before the personnel board.

CITY OF MOORE PERSONNEL
RULES AND REGULATIONS:

INTENT AND APPLICATION

This manual is applicable to all employees of the City of Moore, except in those areas where current labor management agreement exists. If there is a conflict between these procedures or rules and a labor-management agreement in effect, the labor-management agreement supersedes in the specific articles in the agreement. If the labor-management agreement does not address the procedure, rule, etc. the City of Moore manual applies.

DISMISSAL

The following acts constitute misconduct and are grounds for the dismissal of an employee from the employment of the City of Moore by that employee's department head as approved by the City Manager:

1) habitual tardiness or absenteeism;

2) violation of these Personnel Rules established by the City Council, or departmental rules as established by a department head governing the operation of the department;

3) possession, consumption or distribution of intoxicating liquor, illegal drugs, or other substance while on duty, or reporting to work under the influence of any intoxicating or illegal substance;

4) failure to follow the

instructions of an employee's supervisor;

5) insubordination that constitutes a serious breach of discipline;

6) conviction of a felony or other crime involving moral turpitude;

7) misappropriation, destruction, theft, or conversion of City property;

8) act of incompetency while on duty;

9) neglect of duty;

10) notoriously disgraceful personal conduct;

11) willful falsification of Personnel records;

12) failure to maintain a valid Oklahoma operator's or chauffeur's license, or any other license or certificate in a position with the City in which a valid license or certificate are requirements of the position;

13) excessive unauthorized absences (unauthorized absence is defined as an absence from work by an employee which is not approved by the employee's supervisor). Absence by an employee for the following number of work days shall be used as a guide in determining excessive absenteeism: two (2) workdays in any seven (7) calendar day period; five (5) workdays in any thirty (30) calendar day period; ten (10) workdays in any 180 calendar day period; fifteen (15) workdays in any 360 calendar day period.

14) other acts of an employee deemed to constitute misconduct by the employee's department head, as approved by the City Manager, to be detrimental to the good of the City organization.

PRE-DETERMINATION PROCEDURES

In the event that a "regular" employee misconducts himself/herself in

such a manner to warrant dismissal from employment with the City, as outlined within the Personnel Rules and Regulations; the Department Head shall complete, in writing a report recommending termination and the reason(s) therefore, and forward it to the Personnel Director. At such time, the department head shall allow the employee, where accessible, to examine the report and request that the employee sign it to signify that he/she understands the nature and reasons for the recommended termination, as well as having received a copy of the request. The employee may elect to attach his/her own statement to the department head's recommendation if the employee has signed indicating acknowledgement of a copy of the report.

Upon receipt of a termination recommendation from a department head, by

the Personnel Director, the employee shall be placed on Administrative Leave (with pay), until such time as the Personnel Director can schedule a meeting of the Pre-Determination Review Board. The Pre-Determination Review Board, for purposes of hearing cases of recommended termination of a "regular" employee, shall be composed of the same membership as outlined within these Personnel Rules for the Grievance Review Board. Hearings before the Pre-Determination Review Board will be conducted within these Personnel Rules for the Grievance Review Board. Hearings before the Pre-Determination Review Board will be conducted within ten (10) working days of receipt of the department head's recommendation of termination. Upon scheduling the hearing, the Personnel Director shall provide the employee, department head,

and other appropriate personnel, with a written notice as to the date, time, and place of the hearing. The employee shall have the opportunity to request rescheduling of the hearing for good cause, if such request is made prior to the hearing; however, hearing shall not be delayed for a period in excess of five (5) working days under any circumstances. If the employee is not present at the hearing and he or she has not requested rescheduling of the hearing prior to it, the recommendation of the department head shall be forwarded directly to the City Manager for consideration, without action by the Pre-Determination Board.

The procedures for the conduct of the hearing shall include:

(1) the presentation of witnesses, documentary evidence or investigatory findings by the department head against

the employee, or a designated representative (legal or administrative) of the department;

(2) the opportunity of the employee to be represented by an attorney or other representative of the employee's choice.

(3) an opportunity for the employee to call and question witnesses and other pertinent parties; however, the Pre-Termination Review Board has no authority, and may not exercise legal actions to compel any individual to testify;

(4) an opportunity for an employee to present documentary evidence which may be applicable to his/her case.

The Pre-Determination Review Board shall consider all evidence presented to it, and shall have the right to call witnesses and request documentary evidence as deemed necessary to rendering an

equitable decision in the case. Hearing of the Pre-Determination Review Board shall be closed to all but necessary personnel including witnesses, and designated representatives of the employer or employee.

Upon completion of the hearing, the Pre-Determination Review Board shall present its decision in writing to the City Manager within five (5) working days of the hearing's conclusion. The decision shall include a synopsis of the facts, a statement of the findings and reasons therefore, and the recommendation of the Board in the case. In cases where the department head's recommendation for termination is not upheld by the Board, the department head shall be provided with a copy of the recommendation of the Board. The employee shall be provided with a copy of the Board decision and

recommendation to the City Manager by certified mail, a copy of the decision and recommendation shall be placed in the employee's personnel file.

The City Manager will review the decision and recommendation of the Pre-Determination Review Board, along with appropriate records related to the case and/or employee's work history with the City, and shall render a determination as to the employee's termination and/or retention within five (5) working days of receiving the results to the Board. Such written decision shall be considered as final in the matter and shall be considered as satisfying the City's obligations regarding due process in an employment dismissal case. A copy of the City Manager's decision shall be included in the employee's personnel file.



Supreme Court, U.S.
FILED
MAY 11 1990
JOSEPH F. SPANIO, JR.
CLERK

No. 89-1559

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STEVE ESTES,
Petitioner,

v.

CITY OF MOORE, OKLAHOMA; MOORE PUBLIC WORKS
AUTHORITY; ROBERT SWANAGON, individually
and as City Manager of the City of Moore,
Oklahoma and Manager of the Moore Public
Works Authority; ODELL MORGAN, individually
and as Chairman of the Personnel Board of
the City of Moore, and CHARLES THOMPSON,
individually and as member of the Personnel
Board of the City of Moore, Oklahoma,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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MAY 1990

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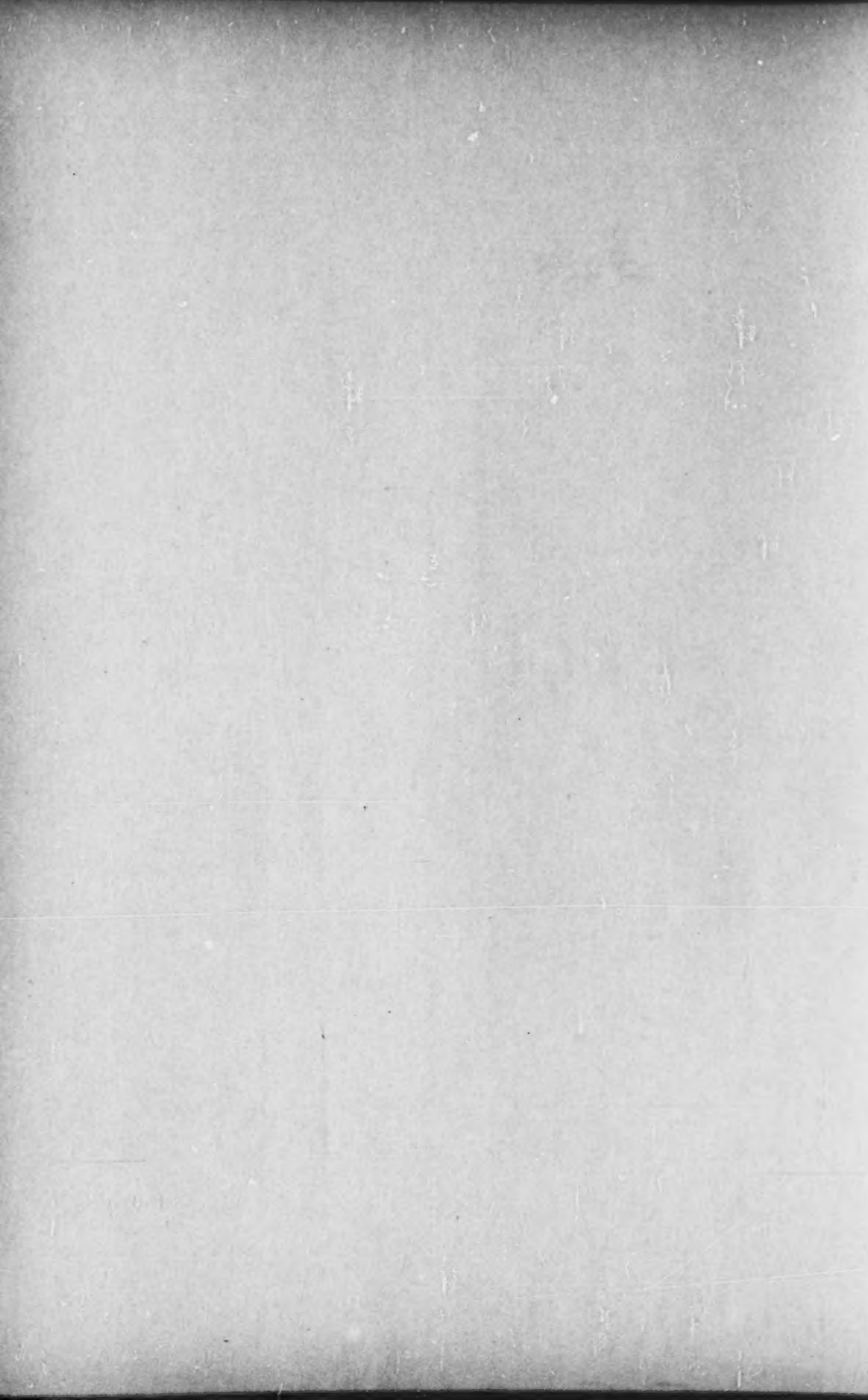


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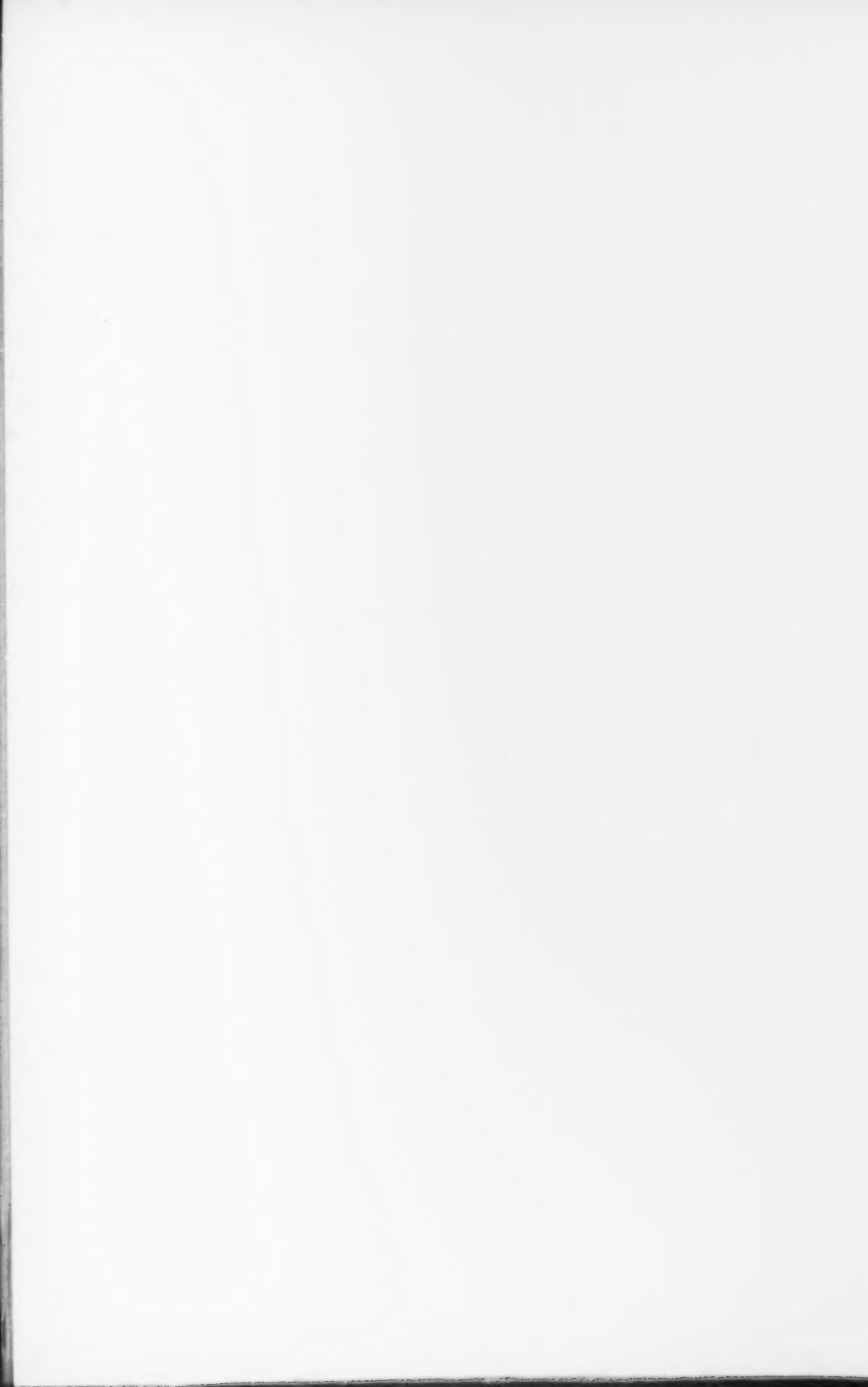


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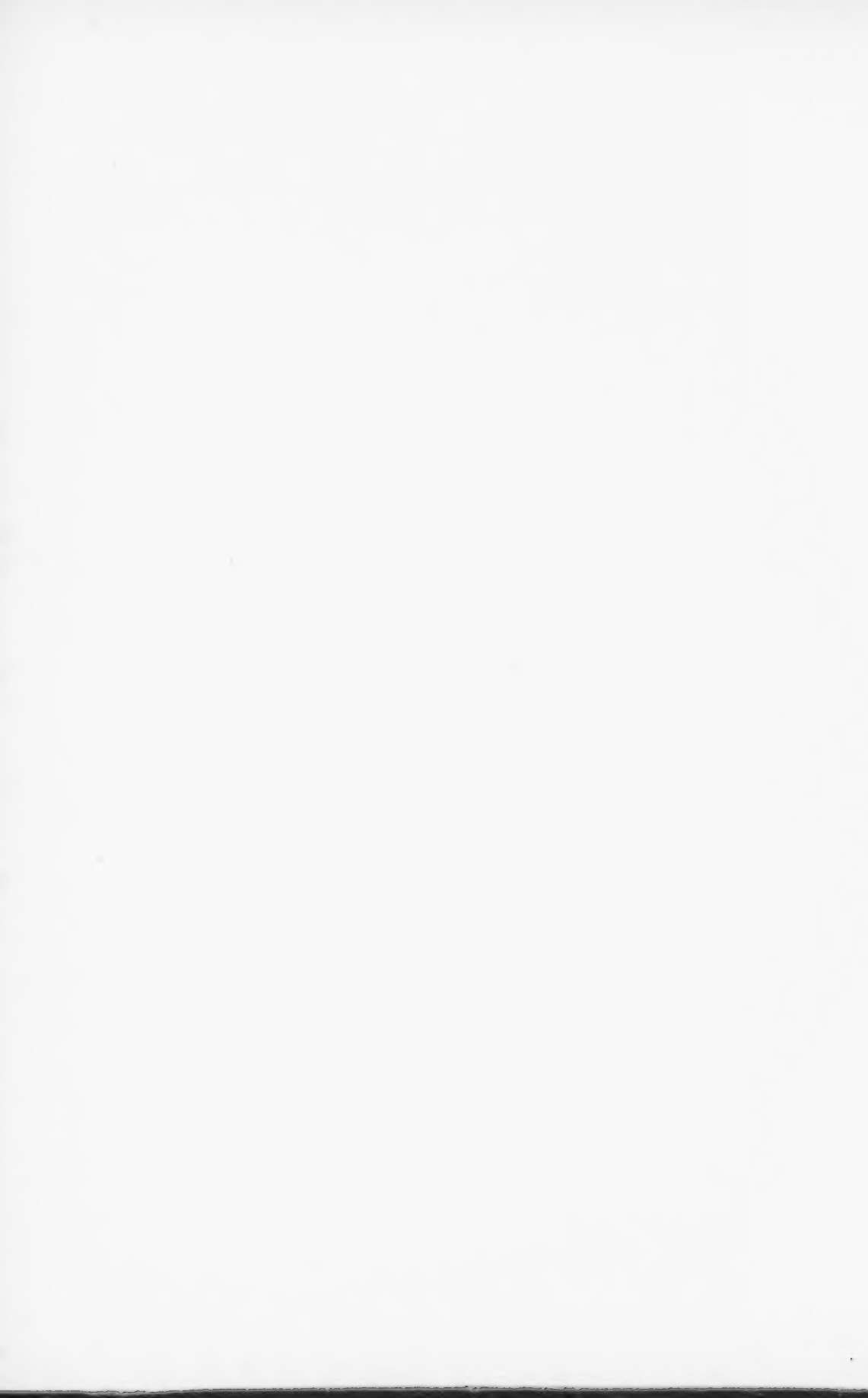


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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No. 89-1559

STEVE ESTES,
PETITIONER,

v.

CITY OF MOORE, OKLAHOMA, MOORE PUBLIC
WORKS AUTHORITY; ROBERT SWANAGON,
INDIVIDUALLY AND AS CITY MANAGER OF THE
CITY OF MOORE, OKLAHOMA, AND MANAGER OF
THE MOORE PUBLIC WORKS AUTHORITY; ODELL
MORGAN, INDIVIDUALLY AND AS CHAIRMAN OF
THE PERSONNEL BOARD OF THE CITY OF MOORE,
AND CHARLES THOMPSON, INDIVIDUALLY AND AS
MEMBER OF THE PERSONNEL BOARD OF THE CITY
OF MOORE, OKLAHOMA, RESPONDENTS.

RESPONSE OF THE CITY OF MOORE, OKLAHOMA,
MOORE PUBLIC WORKS AUTHORITY, ROBERT
SWANAGON, ODELL MORGAN AND CHARLES
THOMPSON TO THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Steve Estes, has
invited this honorable Court to grant a
certiorari review of the Tenth Circuit
Court of Appeals' opinion in favor of the
Respondents and denial of his Petition for

Rehearing. Respondents oppose Petitioner's Request and would show the Court that the arguments advanced by the Petitioner are factually and legally insufficient and certiorari should be denied.

INTRODUCTION

In his attempt to inspire certiorari review by this Court of the Tenth Circuit's opinion and denial of Petitioner's Motion for a Rehearing, Petitioner fashions arguments premised upon both misstatement of fact and misperception of law. These are addressed below.

FACTUAL STATEMENT

Counsel for the Respondents would advise the Court that Petitioner's Brief asserts facts containing several

misstatements and omissions of fact. The following factual omissions and misstatements are identified pursuant to Rule 15.1 of the Rules of the Supreme Court:

A. OMISSIONS

1. Prior to May 7, 1987, Petitioner Steve Estes was part-time Assistant City Attorney for the City of Moore, Oklahoma.
2. On May 7, 1987, Respondent Robert Swanagon, acting in his official capacity as City Manager, exercised his right, pursuant to Section 2-73 of the City Code, to convert the office of City Attorney from a part-time consultant basis to that of a full-time salary based City Attorney's office.
3. Petitioner was notified on May 7, 1987 that as a result of this reorganization his professional

services were to be discontinued pursuant to the Moore City Charter, Section 8-1.

4. Petitioner's release from employment was solely and directly caused by the restructuring of the City Attorney's office.
5. Petitioner Estes could be terminated "for the good of the service".

B. MISSTATEMENTS

In addition to Petitioner's omission of certain facts, Petitioner also misstated several facts:

1. Petitioner, Steve Estes, as a part-time Assistant City Attorney was not a "classified" employee of the City of Moore, and not therefore entitled to any due process proceedings. (See Trial Court's Order Granting Summary Judgment, cited

in Petitioner's Brief,
p. 38.)

2. Unsatisfactory work performance or misconduct is not the only permissible basis for the discharge of a municipal employee where, as in this case, the City Charter specifically and expressly provided the City Manager the right to restructure the City Attorney's office. (Id. at p. 40; Moore City Code, §§ 2-71 and 2-73, attached as Exhibit "A".)
3. Petitioner's assertion that "Swanagon simply summarily fired Petitioner and hired his own personal attorney at a substantially greater salary than that paid Petitioner" is unsupported by the record, void of any support and is being raised improperly for the first time in this Petition for a writ of certiorari. (Petitioner's Brief in

Support of Application
for Writ of Certiorari,
p. 11, ¶ 2.)

The foregoing omissions and misstatements of fact, however, are not essential to a proper disposition of this case. Even assuming the facts asserted by Petitioner are correct, federal and state law dictate that Petitioner did not have a property interest in continued employment and that the rulings below are correct.

STATEMENT OF THE CASE

The Petitioner, Steve Estes, a former part-time Assistant City Attorney for the City of Moore, Oklahoma was released from employment on May 7, 1987, when the office of City Attorney was restructured from a part-time consultant



basis to a full-time salaried position. Petitioner brought suit against the Respondents alleging he was wrongfully discharged and on April 29, 1988, Petitioner filed his Complaint alleging a claim under 42 U.S.C. § 1983 and other pendant state claims.

On February 21, 1989, the United States District Court for the Western District of Oklahoma granted Summary Judgment in favor of Respondents. Petitioner appealed to the United States Court of Appeals for the Tenth Circuit and the trial court's Order was affirmed on November 22, 1989. Petitioner then filed a Petition for rehearing on December 5, 1989, which was denied by the Tenth Circuit in an Order filed January 5, 1990.

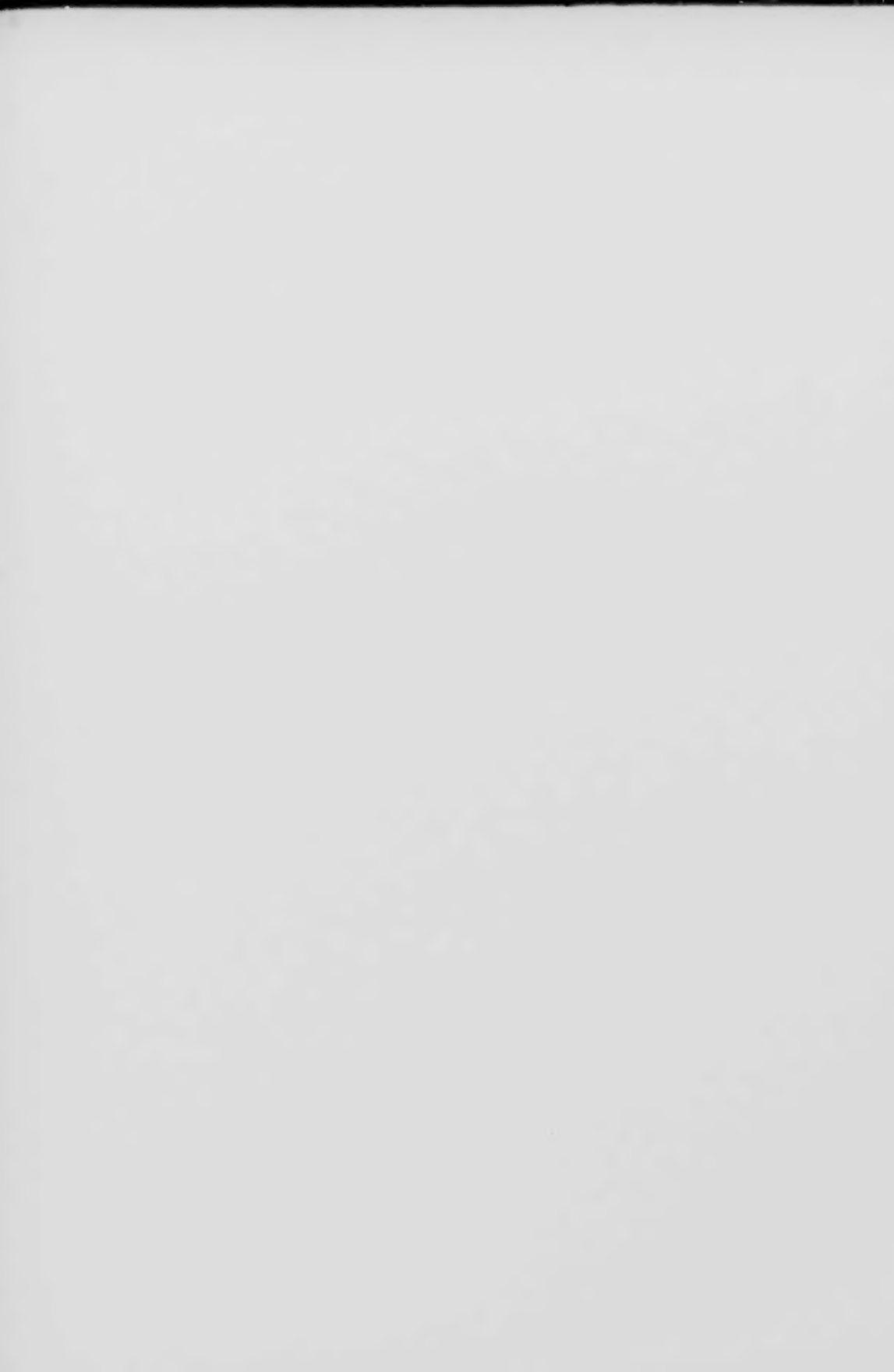
On April 2, 1990, Petitioner served Respondents his "Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit" and in Response and Opposition, Respondents have respectfully submitted this Brief.

ARGUMENTS AND AUTHORITIES

PROPOSITION I

THE TENTH CIRCUIT'S OPINION IS NOT IN CONFLICT WITH CLEVELAND BOARD OF EDUCATION v. LOUDERMILL, INFRA, OR BOARD OF REGENTS v. ROTH, INFRA.

Petitioner bases his entire argument on two fundamentally flawed presuppositions: (1) that Petitioner was a "classified" municipal employee; and (2) that Oklahoma law confers a property interest to Petitioner since the Municipal



Charter provides some employees are entitled to post-termination notice and review of adverse personnel decisions. His erroneous conclusions result from a misunderstanding of: (1) the City's Charter provision, Section 8-3, concerning "classified" employees, (2) the City's employment guidelines regarding grounds for discharge; and (3) a misinterpretation of these provisions under the holdings in Cleveland Bd. of Education v. Loudermill, 470 U.S. 532 (1985), and Board of Regents v. Roth, 408 U.S. 564 (1972). Petitioner's obvious intent is to show that the Tenth Circuit's decision in the case below is in conflict with previous applicable decisions of this Court. Nevertheless, when objectively analyzed, it is readily



apparent that there is no conflict between the Tenth Circuit's decision in this case and either Loudermill or Roth.

Petitioner, in conclusory fashion, refers to his former position as part-time Assistant City Attorney as a "classified" municipal employee, pursuant to Section 8-3 of the City Charter. Without support for this position he reasons he is therefore entitled to full due process proceedings prior to any disciplinary actions or discharge. The court below rejected this argument opining:

With little or no record support, the plaintiff asserts that he is a classified employee, entitled to the benefits of Charter Sections 8-3 and 8-4. Affidavit of Steve Estes ¶ 5. Even if the Court credits the plaintiff's

assertion on this point, his property interest contention fails.

(Trial Court's Order, p. 6, ¶ 1, cited in Petitioner's Brief, p. 38.) Not only is Petitioner's claim insufficiently supported, it is immaterial. Both the trial court and the Tenth Circuit provided Petitioner with every available benefit of doubt, but properly concluded that even if he was considered a "classified" municipal employee, the City Charter merely entitled such employees "to post-termination notice and review of adverse personnel decisions" and did not grant him an expectancy of continued employment. Id. at p. 39. Accordingly, Petitioner's assertion that his purported status as a "classified" employee for the City of Moore is not

determinative of the critical issue of whether Petitioner had a legitimate expectation of continued employment.

Petitioner's second misapplication of the relevant law concerns the City's Guidelines regarding the specific grounds for discharge: "that the only permissible bases (sic) for the discharge of an employee are (sic) unsatisfactory work performance or misconduct." (Petitioners Brief, p. 11, ¶ 1). Petitioner summarily concludes that such protection creates a property interest that dictates the necessity of due process protections prior to any discharge. Petitioner's rationale fails, however, in the wake of Loudermill, infra, and Roth, infra. As properly recognized by the Tenth Circuit Court of

Appeals, to establish his Section 1983 due process claim, Petitioner must show that he had a property interest protected by the Fourteenth Amendment. In the employment context, the required interest is a "legitimate expectation of continued employment". In Board of Regents v. Roth, 408 U.S. 564, 578 (1972), this Court expressly defined the standard to determine the existence of a constitutionally protected property interest:

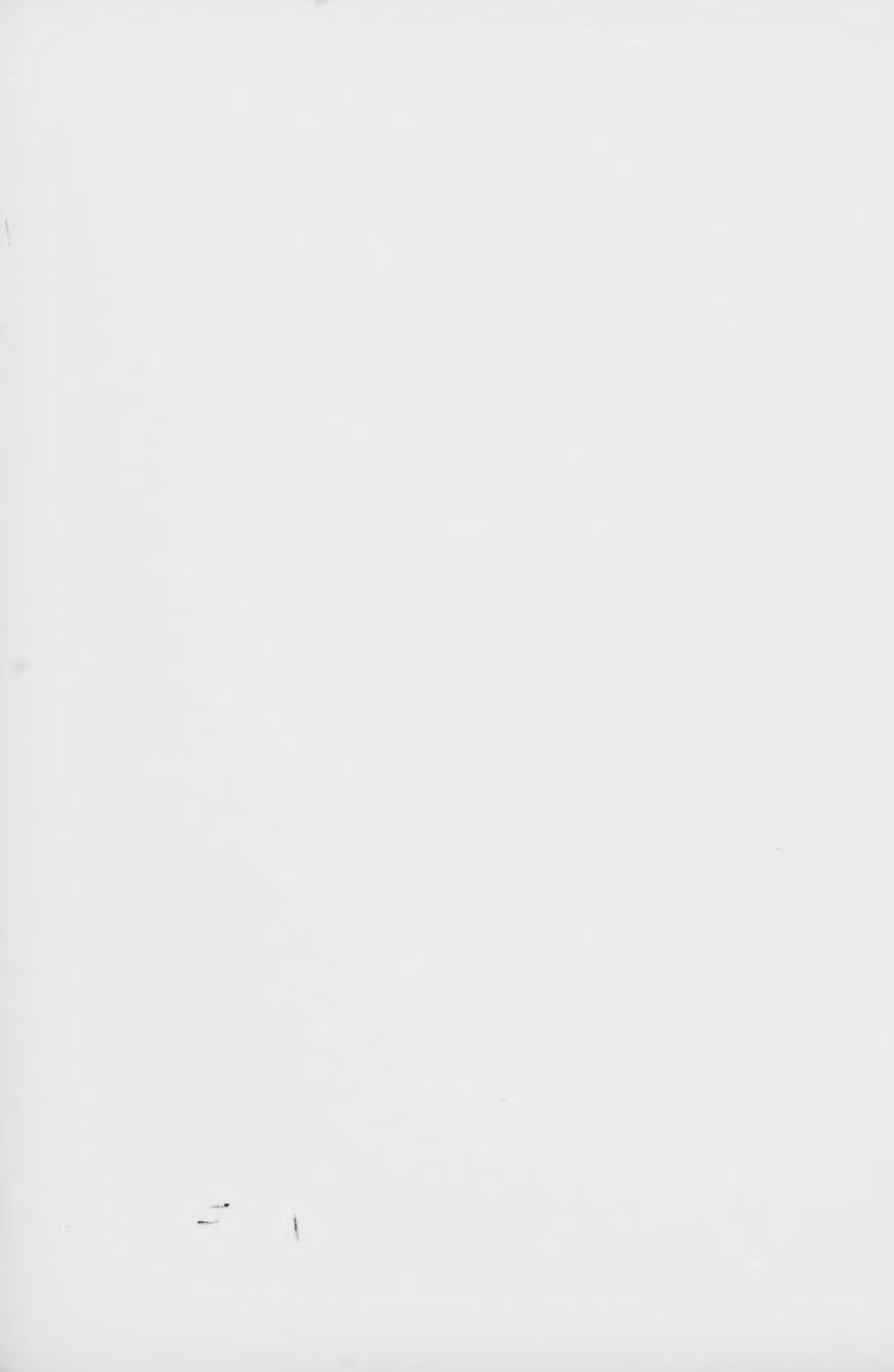
To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

In determining the existence of a protected property interest, the Court



relies on state law. Roth, supra, at 578; Bishop v. Wood, 426 U.S. 341, 345-47 (1976). In the present case, Petitioner offered no evidence that his status was anything other than an employee at-will. Accordingly, as an employee at-will under Oklahoma law, he was terminable at any time with or without cause, and Petitioner did not and could not have a "legitimate claim of entitlement" to continued employment. See Hinson v. Cameron, 742 P.2d 549 (Okla. 1987).

The Trial Court properly construed the facts in the light most favorable to the Petitioner and expressly held Petitioner's reliance on Section 8-4 of the Moore City Charter, even if applicable,



"cannot confer a property interest". (Trial Court's Order, p. 6, ¶ 1, cited in Petitioner's Brief, p. 38) (emphasis added.)

In the present case, contrary to Petitioner's contentions, the opinion by the Tenth Circuit is fully consistent with the previous decisions of this Court. While Petitioner has urged this Court to consider the facts in the present case as similar to those in Loudermill, infra, there is a fundamental factual distinction; in Loudermill the state law provided employees were entitled to a property interest in their employment. Oklahoma law offers Petitioner no such solace, and his reliance on Loudermill is erroneous and misplaced.

PROPOSITION II

THE TENTH CIRCUIT'S DECISION PROPERLY INTERPRETED OKLAHOMA STATE LAW WHICH PROVIDES "REMOVALS FOR THE GOOD OF THE SERVICE" DOES NOT CONFER A PROPERTY INTEREST IN CONTINUED FUTURE EMPLOYMENT.

Petitioner also challenges the Tenth Circuit decision as contrary to pertinent Oklahoma law. Petitioner's contention is, however, based solely upon his own subjective belief that the "entire personnel classification plan" and employment guidelines "are 'terms of employment' that the employees of the City are entitled to rely upon and which vest them with a legitimate expectation that they will continue in employment." (Petitioner's Brief, p. 20-21.) Petitioner cannot, however, support this unilateral



expectation with any legal authority.
There simply is none.

Significantly, the Court squarely considered Petitioner's claim based upon language in the City Charter which provided "removals, demotions, suspensions, and layoffs shall be made solely for the good of the service". (Trial Court's Order, p. 4, ¶ 1, cited in Petitioner's Brief, p. 34) (emphasis in Order). The Court held:

Construing Oklahoma law, both state and federal courts have held that the underscored language does not confer a property interest on employees. See Graham v. City of Oklahoma City, 859 F.2d 142, 146 (10th Cir. 1988); Meder v. City of Oklahoma City, 672 F. Supp. 500, 501-02 (W.D. Okla. 1987); Hall v. O'Keefe, 617 P.2d 196, 198-200 (Okla. 1980).

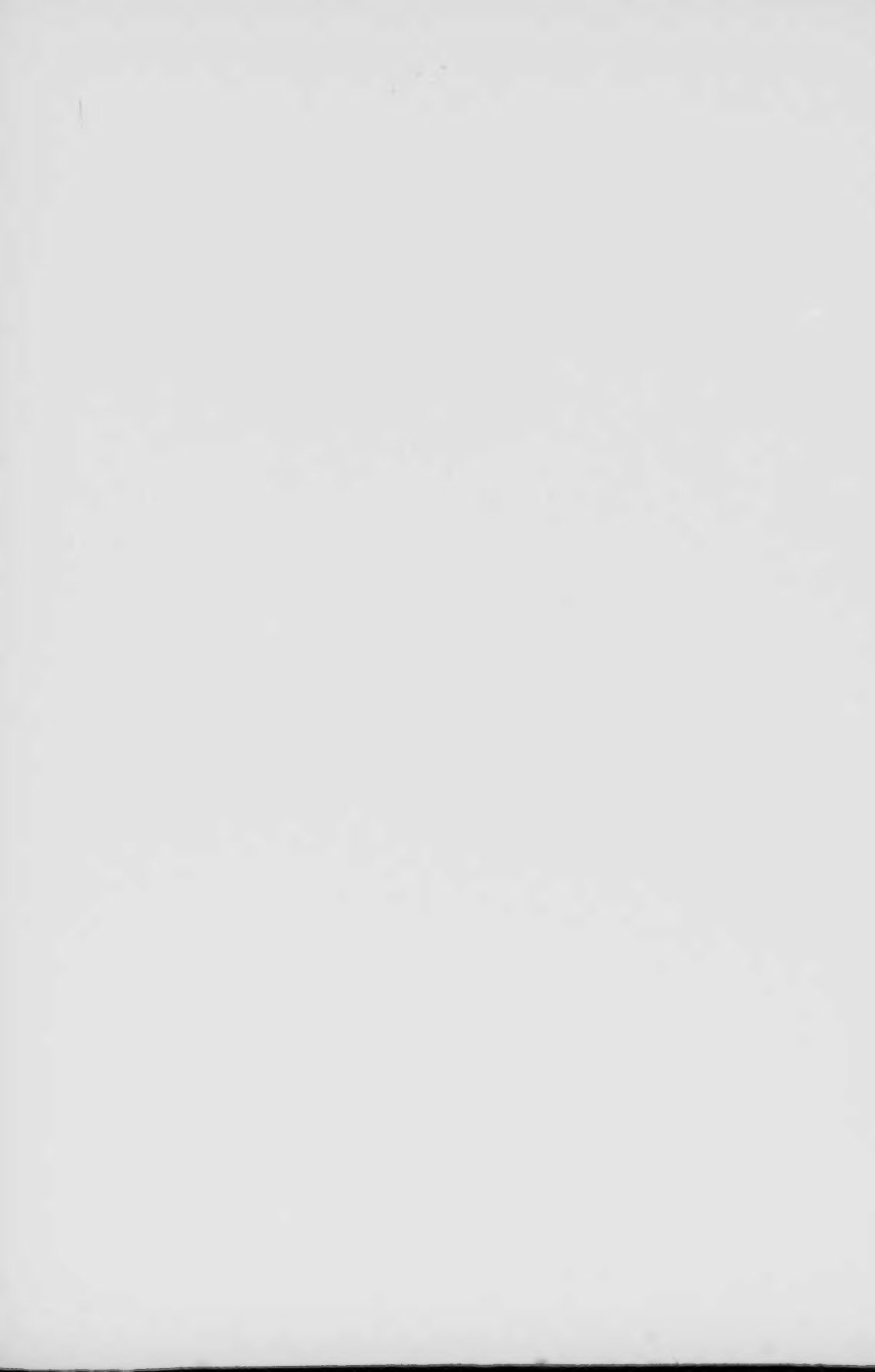
Id. at pp. 34-35.

Petitioner also boldly asserts that the personnel rules of the City of Moore create a property interest. In an attempt to construct some type of foundation to support this contention, Petitioner suggests the Rules "constitute a legislative and regulatory plan for employee protection . . . against removal except for cause." (Petitioner's Brief, p. 20-21.) Petitioner then cites Vinyard v. King, 728 F.2d 428 (10th Cir. 1984), and selectively quotes language that states "a public employee may have a 'sufficient expectancy of continued employment to constitute a property interest'" (Petitioner's Brief, p. 12) (citing Vinyard, supra). The frail underpinnings

of Petitioner's argument crumble upon closer examination.

The trial court expressly considered Petitioner's claims regarding the personnel rules of the City of Moore and held:

The plaintiff Estes' reliance on the personnel rules of the City of Moore is also misplaced. To be sure, viewed in isolation, a city's personnel rules or guidelines may create a sufficient expectation of continued employment to invoke the protections of the due process clause. See Vinyard v. King, 728 F.2d 428, 432 (10th Cir. 1984). However, in the instant case, the Charter of the City of Moore empowers the city manager to discharge employees "for the good of the service." As discussed above, this Charter language vests the City Manager with a wide range of discretion



in making personnel decisions. Such Charter-based discretion cannot be effectively circumscribed by personnel regulations and the like. As the Tenth Circuit noted in Graham: "Under Oklahoma law, where certain terms of employee dismissals are explicitly stated in the city charter, the City Manager or other city officials are not authorized to alter or otherwise restrict these terms so as to legally bind the city." 859 F.2d at 146; Thus, the personnel rules and regulations of the City of Moore could not give the plaintiff Estes what the Charter expressly denied him, a property interest in continued employment.

(Trial Court's Order, p. 7, ¶1, cited in Petitioner's Brief, pp. 40-41) (citations partially omitted). Similarly, the Tenth Circuit expressly considered Petitioner's claim under the personnel rules and held



Graham, supra, was controlling. (Tenth Circuit's Order, p. 2, ¶ 1, cited in Petitioner's Brief, p. 26.) Accordingly, Petitioner's reliance on the personnel rules collapses under its own weight.

Petitioner also challenges the inherent power of the Moore City Council vis-a-vis the Moore City Manager. Petitioner blithely suggests that neither the trial nor the appellate court addressed the relative powers of the Council and Manager in personnel matters. He argues that the Council enacted ordinances (as expressions of "policy") which circumscribe the charter-bestowed power of the City Manager to appoint and remove personnel. Contrary to Petitioner's suggestion, both courts below addressed this question:



. . . the Charter of the City of Moore empowers the city manager to discharge employees "for the good of the service." . . . Such Charter-based discretion cannot be effectively circumscribed by personnel regulations and the like.

(Trial Court's Order, p. 7, ¶ 1, cited in Petitioner's Brief, p. 40.) For purposes of these issues the City Charter reigns supreme and under Oklahoma law where the Charter explicitly sets forth the power of the City Manager regarding dismissals, it cannot be gainsaid by a council-authorized personnel rule.

Despite Petitioner's best effort, there has been no showing that the Tenth Circuit improperly interpreted or applied Oklahoma law and certiorari must be denied.



PROPOSITION III

PETITIONER HAS WHOLLY FAILED
TO ESTABLISH ANY REASON
JUSTIFYING A REVIEW OF THE
TENTH CIRCUIT'S ORDER BELOW
ON A WRIT OF CERTIORARI.

Rule 10 of the Rules of the Supreme Court expressly dictates the predicate foundation necessary to justify this Court's exercise of its inherent judicial discretion to grant Petitioner a review of the Tenth Circuit's Order below on a writ of certiorari. Sup. Ct. R. 10 (effective January 1, 1990). While not comprehensive, Rule 10 sets out the type of compelling reasons justifying a review of a circuit court's order on a writ of certiorari. Those reasons can be summarized as follows:



(1) A United States Court of Appeals Decision is in conflict with:

- (a) Other Courts of Appeals;
- (b) Applicable Decisions of the Supreme Court; and
- (c) A Decision of a state court of last resort.

(2) A United States Court of Appeals Decision on a Federal question:

- (a) Should be settled by the Supreme Court;
- (b) In conflict with decisions by the Supreme Court; and
- (c) In conflict with a state court of last resort decision.

(3) A United States Court of Appeals has sanctioned as lower court or itself departed from the accepted and usual course of judicial procedures.



See Sup. Ct. R. 10(a), (b) and (c). As described above, Petitioner's only arguable justification for inviting this Court to grant a writ of certiorari is that the Tenth Circuit's Order is in conflict with this Court's previous decisions concerning property interests in the context of an alleged wrongful discharge and/or the Tenth Circuit Court improperly interpreted Oklahoma State law concerning when a Municipal Charter and/or personnel rules confer a property interest protected by the Constitution of the United States. Nevertheless, for the reasons previously set forth, Petitioner has wholly failed to show any such conflict or other such special and important justification.



Accordingly, Petitioner's invitation for certiorari should be denied.

CONCLUSION

A review on a writ of certiorari is not a matter of right but rather, a matter of judicial discretion founded upon a special showing of important reasons critical to the continued enforcement of the guarantees of the Constitution of the United States. Accordingly, only material and genuine petitions for certiorari can be considered and accepted. Petitioner's Application does not satisfy this high standard.

The Tenth Circuit opinion is both well-reasoned and well-supported and clearly shows that the applicable federal and state law was properly applied to the



undisputed facts resulting in the failure of Petitioner's claim. Moreover, the absence of any special and important reason in support of this Petition for Certiorari further demonstrates the propriety of denying it. The Court should reject this Petition and leave the opinion of the Tenth Circuit undisturbed.

Respectfully submitted,

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CERTIFICATE OF MAILING

On this _____ day of May, 1990, a true and correct copy of the above and foregoing instrument was mailed, with postage prepaid thereon, to:

William Amis Pipkin
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Moore, OK 73160
Counsel for Petitioner

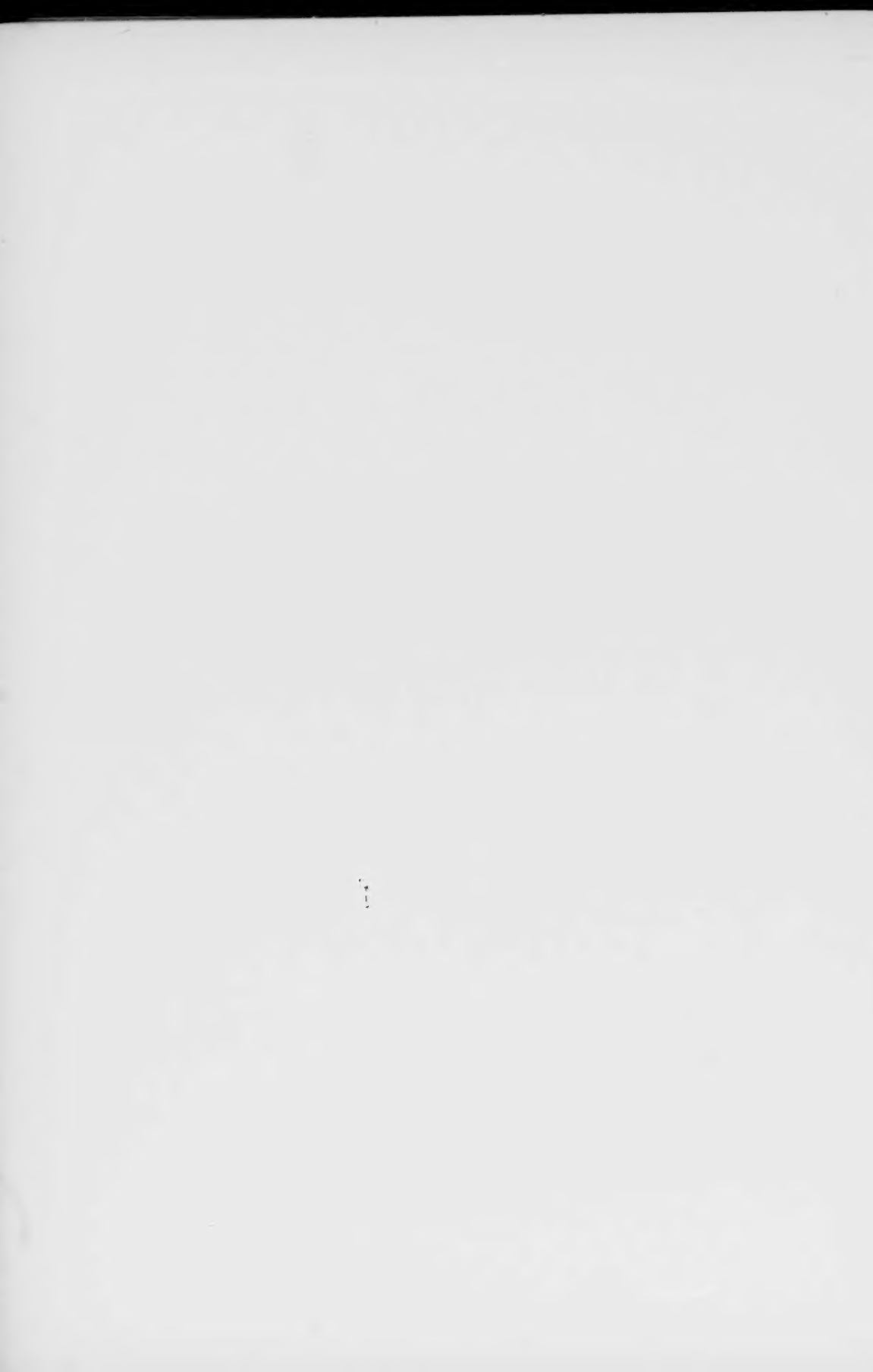
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APPENDIX "A"

Sec. 2-71. City attorney, office.

There is hereby created the office of city attorney, who shall be a person of good moral character, licensed to practice law in the state, who shall be appointed by the city manager.

(Code 1973, § 1-33)

Sec. 2-72. Duties and compensation.

It shall be the duty of the city attorney to advise the city council and all city officers in the performance of their duties. He shall appear, prosecute and defend all actions wherein the city is a party. He shall perform such other professional services as may be required of him by the city manager or council, for such compensation as shall be fixed by the city manager.

(Code 1973, § 1-34)

Cross reference--Municipal court and judge, Ch. 15.

Sec. 2-73. Other business.

The city attorney shall be entitled to engage in the private practice of law to the extent that the same does not interfere with or conflict with his duties as city attorney, and such attorney may be retained on a part-time or consulting basis, as the city manager determines.

(Code 1973, § 1-35)